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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA

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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 BRIAN KENNETH NASH,

14 Defendant.
15

Case No. 3:22-cr-00061-LRH-CLB

ORDER

16 Before the Court is Defendant Brian Kenneth Nash’s (“Nash”) Motion to Suppress
17 evidence seized from an alleged unconstitutional search. ECF No. 23. The government filed an
18 opposition (ECF No. 27), to which Nash replied (ECF No. 29). The Court finds that no evidentiary
19 hearing on the matter is required. For the reasons articulated in this Order, the Court grants in part
20 and denies in part the motion.

21 **I. BACKGROUND**

22 On August 1, 2022, Lyon County Sheriff’s Office (the “LCSO”), deputies were dispatched
23 to 5365 Desert Lane in Stagecoach, Nevada, after a “drive-by” shooting was reported. ECF No.
24 27-2 at 2. The reporting party observed a gray SUV pulling a dump trailer flee the area after several
25 gun shots came from the passenger side of the vehicle. *Id.* Deputy R. Stout observed a “gray GMC
26 Yukon (bearing Nevada license plate 86A350) . . . pulling a dump trailer” while he was driving to
27 the scene of the reported shooting. *Id.* Deputy Stout stopped the SUV and waited for back-up
28 before he read the suspect vehicle driver his *Miranda* rights. *Id.* at 2–3. The driver stated he

1 understood his rights and agreed to speak with the officers at which point he denied knowledge of
2 any shooting. *Id.* at 3.

3 Deputy Stout explained to the other officers that he had not yet responded to the scene of
4 the reported shooting and needed to do so to speak with the reporting party. *Id.* After he transferred
5 the suspect vehicle driver into another officer's patrol vehicle, Deputy Stout arrived at the scene
6 of the alleged shooting. *Id.* The reporting party stated that gunfire woke him up and as he looked
7 out of his bedroom window, he observed a dark colored SUV pulling a black dump trailer quickly
8 traveling down the street. *Id.* The reporting party also observed and identified a man fleeing the
9 scene on-foot. *Id.* The man appeared to be unharmed and emerged from behind a black Subaru
10 with bullet holes in it. *Id.* Deputy Stout spoke with an additional observer who offered a similar
11 description of the suspect vehicle and reported that a male passenger extended his arm out of the
12 suspect vehicle's front passenger-side window with what appeared to be a gun in hand. *Id.* The
13 observer told Deputy Stout he could identify the suspect vehicle if he saw it again and the two
14 drove to the scene of the traffic stop. *Id.* Once there, the observer confirmed that the gray GMC
15 Yukon Deputy Stout stopped was the same vehicle he initially observed fleeing the scene after the
16 reported shooting. *Id.* at 4.

17 Deputy Stout returned to the scene of the alleged shooting to collect evidence and take
18 photographs. *Id.* Meanwhile back at the traffic stop, Sergeant Pope spoke with the suspect vehicle
19 driver who stated that Nash was both in the vehicle with him and was the shooter. *Id.* The suspect
20 vehicle driver also reported that Nash and the same man the reporting party saw fleeing on-foot
21 from the alleged shooting, had some type of disagreement prior to the shooting. *Id.* The suspect
22 vehicle driver reported that he dropped Nash off at Nash's home after the shooting which he
23 described as "the second to last house at the north end of Apache Drive." *Id.*

24 After this, another deputy accompanied Deputy Stout to the second to last house at the
25 north end of Apache Drive which they noted to be 4665 Apache Drive. *Id.* The deputies spoke to
26 the resident and discovered that Nash did not live there. *Id.* The resident claimed a man matching
27 Nash's description lived in a motorhome just outside the neighboring home located south of her
28 own. *Id.* The resident further reported that a vehicle matching the suspect vehicle description

1 dropped Nash off an hour earlier at the neighboring address. *Id.* The neighboring address was 4725
2 Apache Drive in Stagecoach, Nevada. ECF No. 23-2 at 3.

3 That same day, the LCSO informed Detective Nicholas Baugh of the drive-by shooting
4 and that Nash was one of three suspects involved. *Id.* at 3. Detective Baugh confirmed that he
5 knew Nash from previous law enforcement contacts. *Id.*

6 On August 5, 2022, Deputy Mullen responded to 4725 Apache Drive due to a report of a
7 domestic dispute between husband and wife. ECF No. 27-3 at 2. By the time Deputy Mullen
8 arrived, the husband was no longer on the property. *Id.* The reporting party, and resident, relayed
9 that Nash, his wife, and their son were staying on her property. *Id.* Deputy Mullen contacted Nash's
10 wife who reported Nash hit her after they got into an argument about their trailer. *Id.* Nash's wife
11 showed Deputy Mullen their black and white camper trailer located on the property when he asked
12 her where the battery occurred. *Id.* at 3.

13 On August 11, 2022, Detective Baugh applied for a search warrant in which he opined that
14 Nash was (1) a prohibited person in possession of a firearm in violation of Nev. Rev. Stat. § 202.36,
15 and (2) involved in an assault with a deadly weapon, a felony described by Nev. Rev. Stat.
16 § 200.471. *See generally*, ECF No. 23-2. The subjects of the search warrant were Nash, the 4725
17 Apache Drive property, and various vehicles. *Id.* at 5–6. The affidavit application requested
18 permission to search the person, residence, and vehicles for “[a]ny firearms, ammunition or
19 evidence related to the assault with a deadly weapon.” *Id.* at 6. The affidavit also referenced the
20 domestic abuse incident that involved Nash as well as an additional incident in which a known
21 associate of Nash informed officers Nash shot at him. *Id.* at 4, 5.

22 Detective Baugh's search warrant application was granted. ECF No. 23-1 at 3–4. It was
23 ordered that Nash; 4725 Apache Drive, including a black and white camp trailer, all out buildings,
24 trailers, camp trailers, and motorhomes on the property; a 2017 black Nissan Rogue (NV license
25 plate 930H61, VIN#5N1AT2MT8HC809909); and a 2015 Nissan (NV license plate 487R05,
26 VIN#3N1CN7AP8FL935087) (the “white Nissan”), were to be searched for the following:

27 Firearms any caliber, any ammunition, any firearm related gear, parts or equipment
28 including those items contained within safes or other locked boxes and/or
containers or vehicles. All incoming and outgoing phone numbers and text

1 messages, stored phone numbers, phone lists, Esn's, SIM card data, e-mails,
 2 photographs, actual phone number for specific phone and any other pertinent
 3 information stored in the phone being searched related to the ADW or possession
 4 of illegal firearms. Any gang indicia, but not limited to drawings, photos, logos,
 Articles of personal property tending to establish the identity of persons in control
 of vehicle and residence including, but not limited to, rent receipts, utility bills,
 letters, bank statements, official documents and other items of personal property.

5 *Id.* at 4. The day officers executed the search warrant, Nash was identified driving the white Nissan
 6 and parking it at his residence on the 4725 Apache Drive property. ECF No. 27-5 at 3. Nash was
 7 also observed going inside the white Nissan numerous times. *Id.*

8 The following property was found and seized as a result of the ensuing search at 4725
 9 Apache Drive: (1) from the white Nissan, a black and brown Smith and Wesson .38 revolver loaded
 10 with five rounds (serial #J506867), 40 rounds of .38 special ammunition, a black digital scale, a
 11 small plastic bag with a white crystalline substance later identified as methamphetamine, and one
 12 .38 caliber spent shell casing; (2) from Nash's person, a black Apple iPhone; (3) from the camp
 13 trailer, methamphetamine pipes; (4) from the storage shed west of the camp trailer, 18 rounds of
 14 .38 special ammunition—personal property and gang indica were also observed in the storage
 15 shed; and (5) two gang drawings. ECF No. 27-5 at 3–5. Nash motions the Court to suppress all the
 16 evidence seized pursuant to the search warrant and requests an evidentiary *Franks* hearing for
 17 other reasons. *See generally*, ECF No. 23.

18 **II. LEGAL STANDARD**

19 The Fourth Amendment to the Constitution of the United States provides that “[t]he right
 20 of the people to be secure in their persons, houses, papers, and effects, against unreasonable
 21 searches and seizures, shall not be violated[.]” U.S. Const. amend. IV. While a warrant is generally
 22 required, “[t]he ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ [meaning] the
 23 warrant requirement is subject to certain exceptions.” *Brigham City, Utah v. Stuart*, 547 U.S. 398,
 24 403 (2006) (citing *Flippo v. West Virginia*, 528 U.S. 11 (1999)). “[W]arrantless searches and
 25 seizures are per se unreasonable” under the Fourth Amendment. *United States v. Cervantes*, 703
 26 F.3d 1135, 1141 (9th Cir. 2012). Any evidence resulting from an unconstitutional search or seizure
 27 cannot be admitted, and therefore must be suppressed. *See Wong Sun v. United States*, 371 U.S.
 28 471, 485 (1963).

1 **III. DISCUSSION**

2 Nash motions the Court to suppress all the evidence seized during the search of the Apache
 3 Drive property because the warrant was allegedly overbroad and lacked probable cause as to both
 4 the 4725 Apache Drive property and the items to be seized. *See generally*, ECF No. 23. Nash also
 5 requests an evidentiary *Franks* hearing because Detective Baugh inaccurately reported Nash’s
 6 criminal history and omitted material facts in his affidavit. *Id.* at 4. In opposition, the government
 7 contends that no *Franks* hearing is required because the misstated criminal history and omissions
 8 were not material to a finding of probable cause. ECF No. 27 at 11–13. More generally, the
 9 government argues that the affidavit and issued search warrant were not overbroad and did not
 10 lack probable cause as to the place to be searched or the items to be seized. *Id.* at 6–8.

11 **A. The Search Warrant and Probable Cause**

12 Specifically, Nash argues that the government lacked probable cause to search the 4725
 13 Apache Drive property and to search for each category of evidence to be seized: (1) firearm-related
 14 evidence, (2) phone-related evidence, (3) gang indica, and (4) personal property. ECF No. 23 at 7,
 15 10. As to the Apache Drive property, Nash alleges that Detective Baugh lacked support to believe
 16 Nash resided on or had access to the property. *Id.* at 8. In opposition, the government argues that
 17 the search warrant was supported by probable cause because the totality of the circumstances
 18 suggested that there was a fair probability evidence of the crime would be located on the property
 19 where Nash appeared to reside. ECF No. 27 at 7.

20 As to the categories of evidence to be seized, Nash offers many supporting arguments that
 21 are particular to each category. However, the Court only addresses the most material category of
 22 evidence in this Order, the firearm-related category. Nash alleges that Detective Baugh failed to
 23 describe the firearm-related category with sufficient particularity because he knew that the gun
 24 allegedly used in the assault was an “unknown make/caliber revolver” but requested permission to
 25 search for “any firearm, any ammunition, or any firearm related gear.” ECF No. 23 at 10–12.
 26 Therefore, to Nash, the search warrant lacked probable cause for the firearm-related category
 27 because the affidavit was insufficiently particular and overbroad. *Id.* at 12.

1 A search warrant “must comply with two related but distinct rules[,]” the first of which is
2 particularity. *United States v. Weber*, 923 F.2d 1338, 1342 (9th Cir. 1990). Particularity is a
3 function of sufficiently describing “the place to be searched or things to be seized” while taking
4 account of the “circumstances of the case and the types of items involved.” *Id.* (citing *United States*
5 *v. Spilotro*, 800 F.2d 959, 963 (9th Cir.1986)). Second, the warrant “must be no broader than the
6 probable cause on which it is based.” *Id.* (citing *VonderAhe v. Howland*, 508 F.2d 364
7 (9th Cir. 1974)).

8 Probable cause for a search “requires a fair probability that contraband or evidence of a
9 crime will be found in a particular place, based on the totality of the circumstances.” *United States*
10 *v. Grant*, 682 F.3d 827, 832 (9th Cir. 2012) (quotation omitted). Moreover, probable cause requires
11 the court “to deal in probabilities, not certainties, and for that reason it doesn't demand ‘the same
12 type of specific evidence of each element of the offense as would be needed to support a
13 conviction.’” *United States v. Nora*, 765 F.3d 1049, 1053 (9th Cir. 2014) (quoting *Adams v.*
14 *Williams*, 407 U.S. 143, 149 (1972)).

15 Probable cause existed as to the search of the 4725 Apache Drive property because there
16 was a fair probability that evidence of a crime would be found there. The affidavit clearly contains
17 a report that identified Nash as the shooter in the alleged assault. ECF No. 23-2 at 3. Moreover, it
18 was clear to the deputies that Nash appeared to reside on the 4725 Apache Drive property. Nash
19 correctly points out that Detective Baugh misstated that the domestic battery took place at the same
20 location described as Nash’s residence by the suspect vehicle driver. However, Nash fails to
21 reconcile that the affidavit also stated that the driver’s description of Nash’s home was “[l]ater
22 identified as, 4725 Apache Drive[.]” *Id.* The affidavit also referenced the alleged domestic dispute
23 incident that involved Nash and his wife at 4725 Apache Drive, further reinforcing that Nash
24 appeared to live on the property. *Id.* at 4. The totality of the circumstances suggest that there was
25 a fair probability evidence of the crime would be found on the Apache Drive property because
26 Nash, a suspect in the alleged assault, was believed to live there. The Court finds that probable
27 cause existed to search the 4725 Apache Drive property where Nash appeared to reside.
28

1 Probable cause also existed as to the search and seizure of any firearm-related evidence.
2 Nash offers *Nora* in support of his argument that this category of evidence lacked probable cause.
3 765 F.3d 1049. In *Nora*, the district court’s ruling on a motion to suppress was reversed because
4 the Ninth Circuit determined that the officers' observation of Nora with a blue-steel semiautomatic
5 handgun, paired only with the officers' knowledge of Nora's criminal history, did not provide
6 probable cause for the search and seizure of firearms and ammunition in general. *Id.* at 1058–59.
7 The Ninth Circuit reasoned that “probable cause to believe that some incriminating evidence will
8 be present at a particular place does not necessarily mean there is probable cause to believe that
9 there will be more of the same.” *Id.* at 1060.

10 According to the Ninth Circuit, the issue in *Nora* was “whether a fair probability existed
11 that Nora owned other firearms, in addition to the single firearm the officers had observed.” *Id.* at
12 1059. That, of course, is the same issue here. Cognizant of *Nora*, the Court must also recall that
13 “hard and fast rules” do not dictate a determination of probable cause in the Ninth Circuit. *United*
14 *States v. Freitas*, Case No. 20-CR-00223-LHK-1, 2021 WL 4222041, at *5 (N.D. Cal. Sept. 16,
15 2021). Instead, probable cause is controlled by the totality of the circumstances which requires the
16 court to consider factors “in the full context of each particular case.” *United States v. Valdes-Vega*,
17 738 F.3d 1074, 1079 (9th Cir. 2013).

18 The factors and full context of this Case are different than those in *Nora*. First, Detective
19 Baugh’s affidavit provides a breadth of evidence that the Court may consider in its determination
20 of probable cause. For example, deputies did not observe Nash with a specific type of gun. Instead,
21 three witnesses vaguely described the firearm from the alleged assault as “an unknown
22 make/caliber revolver,” “a hand gun,” and “a gun.” ECF No. 23-2 at 3–4. Second, Detective
23 Baugh’s affidavit includes an additional and unrelated incident in which Nash allegedly shot at
24 another individual, but no description of the firearm was given. *Id.* at 5. As Detective Baugh
25 explains in his affidavit, “it is common for individuals who engage in [. . .] assaults with a deadly
26 weapon to be in possession of firearms or other weapons.” *Id.* Detective Baugh sufficiently
27 explains that because Nash was allegedly involved in the drive-by shooting, it is probable that he
28

1 may possess more firearms—for example, the one Nash allegedly used in the additional shooting
2 incident.

3 The totality of the circumstances in the present matter establish a fair probability that Nash
4 may have possessed more than one firearm. *See United States v. King*, Case No. 20-10007, 2021
5 WL 127828, 708–09 (9th Cir. 2021) (affirming probable cause existed to search for any firearms
6 as opposed to a singular large silver and gold revolver the defendant was observed with because,
7 amongst other things, the affidavit included an additional report that the defendant received and
8 concealed a firearm for another person which helped establish a fair probability that the defendant
9 owned or possessed other firearms).

10 For the above reasons, the Court finds that probable cause existed to search the 4725
11 Apache Drive property for firearms and firearm-related evidence.¹

12 **B. The Firearm Seizure**

13 Nash argues that the firearm must be suppressed because it resulted from an overbroad
14 search warrant. ECF No. 23 at 15. In opposition, the government alleges that the deputies: (1) were
15 lawfully on the property because they had a valid search warrant; (2) lawfully seized the revolver
16 from the vehicle under the plain-view exception; and (3) after seeing the revolver, had probable
17 cause to search the vehicle under the automobile exception which led to the recovery of additional
18 ammunition. ECF No. 27 at 9–10. In reply, Nash argues that the plain-view and automobile
19 exceptions are not applicable because the warrant was invalid, meaning the officers would have
20 had to trespass onto the curtilage of Nash’s property to put themselves in a position where the
21 firearm was in plain view. ECF No. 29 at 9.

22 Warrantless searches are “per se unreasonable.” *Horton v. California*, 496 U.S. 128,
23 133– 34, n. 4 (1990). The warrant requirement, however, is subject to certain exceptions. *Stuart*,

24
25 ¹ The government concedes that the affidavit failed to support a finding of probable cause to search the vehicles and
26 seize cell phones. ECF No. 27 at 6, n.1. Because the Court holds that probable cause existed as to the search of the
27 Apache Drive property and the seizure of firearms and firearm-related evidence, a material portion of the warrant,
28 severance is appropriate here. *See United States v. Kow*, 58 F.3d 423, 428 (9th Cir. 1995) (“severance is not available
when the valid portion of the warrant is a relatively insignificant part of an otherwise invalid search.”). The Court
finds that the seized cell phone must be suppressed. Further, the portions of the warrant authorizing searches for and
seizures of gang indica and personal property must be severed as probable cause did not exist for them. The Court
reserves ruling upon the drugs and drug paraphernalia.

1 547 U.S. at 403. “The plain-view doctrine is often considered an exception to the general rule that
2 warrantless searches are presumptively unreasonable.” *Horton*, 496 U.S. at 133. While lawfully
3 executing a search warrant, an officer may seize evidence of a crime if the object is discovered in
4 plain view. *Roe v. Sherry*, 91 F.3d 1270, 1272 (9th Cir. 1996).

5 For the plain-view doctrine to apply, officers must not violate the Fourth Amendment in
6 arriving at the place from which evidence could be plainly viewed. *Horton*, 496 U.S. at 136.
7 Essentially, this requires that “the officers ‘have a lawful right of access to the object itself.’”
8 *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018) (quoting *Horton*, 496 U.S. at 136–37). The Court
9 has held that the search warrant was valid because probable cause existed to search the Apache
10 Drive property for firearms and firearm-related evidence. *See* search warrant and probable cause
11 discussion *supra* Section III.A. The deputies possessed a valid search warrant that gave them a
12 lawful right of access to enter the 4725 Apache Drive property and search for firearms and
13 ammunition. As such, the Court finds that Nash’s Fourth Amendment protections were not violated
14 because the deputies had a lawful right of access to the property where the vehicle was parked.

15 The plain-view doctrine requires that (1) the item be in plain view, and (2) the item’s
16 incriminating character be immediately apparent. *Horton*, 496 U.S. at 136–37. Here, both
17 requirements are clearly satisfied. Deputies observed the firearm on the passenger seat of the
18 vehicle parked within feet of Nash’s camp trailer. Moreover, the vehicle window was open,
19 meaning the deputies view of the firearm was direct, unobstructed, and clear. *See* ECF No. 27-7 at
20 2. Whether the incriminating character of the item is immediately apparent depends on “whether
21 the officers had ‘probable cause to believe [it was] associated with criminal activity.’” *United*
22 *States v. Kahre*, Case No. 2-05-CR-121-DAE-RJJ, 2009 WL 10715476, at *16 (D. Nev. May 12,
23 2009) (quoting *Horton*, 496 U.S. at 131, n. 1). Here, the deputies were aware that Nash was a
24 convicted felon prohibited from possessing a firearm and that he was an identified suspect in the
25 alleged assault as well as an unrelated shooting. The incriminating character of the firearm was
26 immediately apparent to the deputies because they had probable cause to believe that the firearm
27 was associated with criminal activity. For these reasons, the Court finds that the plain-view
28 doctrine clearly applies to the seizure of the firearm.

1 The automobile exception provides that a search of an automobile can be reasonable
2 without a warrant because of an automobile's "ready mobility" as well as "the pervasive regulation
3 of vehicles capable of traveling on the public highways." *Collins*, 138 S.Ct. at 1669–70 (citations
4 omitted). "Under the automobile exception to the warrant requirement, police may conduct a
5 warrantless search of a vehicle if there is probable cause to believe that the vehicle contains
6 evidence of a crime." See *United States v. Scott*, 705 F.3d 410, 417 (9th Cir. 2012).

7 After seeing the revolver in plain view, the deputies had probable cause to believe that the
8 vehicle contained evidence of a crime. Again, the deputies were lawfully on the property when
9 they observed the firearm in plain view on the passenger seat of the vehicle. They also knew that
10 Nash was a convicted felon prohibited from possessing a firearm. Further, the deputies observed
11 Nash rummaging through the vehicle moments before the search warrant was executed. ECF No.
12 27 at 11. The Court finds that the deputies had probable cause to search the vehicle because the
13 totality of the circumstances establish a fair probability that incriminating evidence would be found
14 inside. For these reasons, the Court denies Nash's request to suppress the firearm and ammunition.
15 The plain-view and automobile exceptions to the exclusionary rule clearly apply in this matter.

16 **C. Misstated Criminal History and Omissions**

17 Nash argues that Detective Baugh's misstated and inaccurate reporting of his criminal
18 history, and other omissions from the affidavit, materially affected a finding of probable cause.
19 ECF No. 23 at 4–7. This is the primary basis on which Nash requests an evidentiary *Franks*
20 hearing. *Id.* The government does not contend that criminal history inaccuracies were included in
21 the affidavit. ECF No. 27 at 11–12. Rather, the government argues that the inaccuracies do not
22 warrant a *Franks* hearing because they were immaterial to a finding of probable cause. *Id.* at 12.

23 A defendant is entitled to an evidentiary hearing concerning the validity of a search
24 warrant's affidavit when a substantial preliminary showing has been made that "(1) the affidavit
25 contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit
26 cannot support a finding of probable cause without the allegedly false information." *United States*
27 *v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000). To be granted an evidentiary hearing, the
28 requesting party must show that the "affidavit purged of those falsities and supplemented by the

1 omissions would not be sufficient to support a finding of probable cause.” *United States v. Stanert*,
2 762 F.2d 775, 782 (9th Cir. 1985). In other words, the requesting party must make a preliminary
3 showing that the affidavit contained “material” misrepresentations or omissions. *See United States*
4 *v. Gonzalez, Inc.*, 412 F.3d 1102, 1110 (9th Cir. 2005) (citation omitted).

5 Whether Nash has made a substantial preliminary showing that the inaccurate criminal
6 history descriptions and other omissions were recklessly or intentionally made is not at issue here
7 because the Court finds that they were not material to a finding of probable cause. The Court
8 acknowledges that Nash’s criminal history was excessively represented by Detective Baugh.
9 However, even after purging the affidavit of the inaccuracies, it remains undisputed that Nash is a
10 twice convicted felon prohibited from possessing a firearm. This fact alone provides sufficient
11 basis for probable cause as Nash is prohibited from possessing any firearm and was also positively
12 identified by an eyewitness to the shooting and assault which was the primary basis of the
13 application for and issuance of the challenged search warrant.

14 The Court finds that the misrepresentations and omissions in the affidavit were not material
15 to a finding of probable cause. For this reason, the Court finds that a *Franks* hearing is not required.

16 **IV. CONCLUSION**

17 IT IS THEREFORE ORDERED that Nash’s motion to suppress (ECF No. 23) is **DENIED**
18 in part and **GRANTED** in part in accordance with this Order.

19 IT IS FURTHER ORDERED that Nash’s request for a *Franks* hearing is **DENIED**.

20 IT IS SO ORDERED.

21 DATED this 3rd day of March, 2023.

22
23 
24 LARRY R. HICKS
25 UNITED STATES DISTRICT JUDGE
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